

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**In re LITERARY WORKS IN  
ELECTRONIC DATABASES  
COPYRIGHT LITIGATION**

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**Master Docket No. M-21-90 (GBD)  
(MDL # 1379)**

**DECLARATION OF IRVIN MUCHNICK IN SUPPORT OF  
MOTION TO VACATE PRELIMINARY APPROVAL AND MOTION TO  
ESTABLISH NEW PROCEDURES FOR FINAL APPROVAL AND AWARD OF  
ATTORNEYS' FEES**

I, Irvin Muchnick, declare as follows:

1. I make these statements based on my own personal knowledge except as to those matters made on information and belief, and, as to those matters, I believe them to be true.

2. I live in Berkeley, California, and am a freelance journalist. My work has appeared in, among other magazines and newspapers, *The New York Times Magazine*, *Sports Illustrated*, *People*, *Spin*, *Spy*, *Lingua Franca*, *The New York Observer*, *Mother Jones*, the *Village Voice*, and the *Los Angeles Times Magazine*. I have read the proposed Settlement Agreement and the forms of Notice attached as exhibits to a declaration by A. J. De Bartolomeo. I have also read the final Memorandum in Support of Motion to Vacate that is being filed on my behalf. I am a member of the plaintiff class in this case.

3. In 1999, after discovering certain distribution by a database of an article that I had written, I obtained a copyright registration for my article “The [Thwak!] Deregulation of [Thump!] Pro Wrestling” – originally published in the June 1988 issue of *The Washington*

*Monthly* (“*Washington Monthly* article”). A true and correct copy of the registration certificate on file with the United States Copyright Office for the *Washington Monthly* article – is attached as Exhibit A. I have one Category A claim as I understand the Settlement Agreement because I believe that the *Washington Monthly* article has been infringed by two new database operators (HighBean and LookSmart), starting in 2003 or 2004. This is further described below. However, under the definitions in the Notice this claim would be a B Category claim. I also would have at least several, and possibly as many as dozens, of Category C claims.

4. I am a long-time authors’ rights advocate. From 1987 to 2001, I was a member of the National Writers Union (“NWU”) and became deeply involved in the problem of secondary rights management in new technologies, which I believe to be an important and cutting-edge public-policy issue. By “secondary rights” I mean the rights to resale or copying of material first published in a newspaper or magazine. I served the NWU in a number of volunteer and paid capacities. My volunteer roles included shop steward at *SF Weekly*, grievance officer, and organizer of a campaign called “Operation Magazine Index,” which alerted authors that their works were being reused without permission or compensation on online databases, and confronted the companies engaged in that practice. My paid roles included assistant director of the NWU (1994-97) and founding administrator of the NWU’s collective-licensing agency, Publication Rights Clearinghouse (1995-97).

5. The “Operation Magazine Index” campaign attracted considerable attention in the consumer and trade press, and throughout the world via the Internet, and resulted in the recruitment of many authors, including well-known ones. In October 1994, Nicholson Baker, a bestselling author, published in *The New York Times* an essay entitled “Infohighwaymen,”

which greatly elevated the profiles of both the NWU and the electronic rights issue. A true and correct copy of the Baker article is attached as Exhibit B.

6. I have published numerous articles of my own on these issues in both consumer and trade publications, including *The New York Times*, the *San Francisco Examiner*, *Macworld*, *Information Today*, and *The Charleston Advisor*, and in industry Internet forums. Some of these pieces are published at my website, <http://www.muchnick.net>.

7. In September 1997, I became a paid consultant to the law firm Robins, Kaplan, Miller & Ciresi (“the Robins firm”). In October 1997, the Robins firm filed a class action on behalf of a group of authors, *Ryan v. CARL Corp.*, which claimed systematic copyright infringement by a document-delivery service, UnCover (“the UnCover case”). In 2000, following rulings in favor of the plaintiffs for partial summary adjudication and class certification, the UnCover case settled for \$7.25 million. I believe this to be the first successful use of a class action on behalf of authors’ copyrights.

8. My consulting agreement with the Robins firm expired several months prior to the settlement of the UnCover case. In examining the execution of the settlement, I was dissatisfied with several aspects of class notice and the performance and level of compensation of the claims administrator, the Arthur Andersen accounting firm, and so informed the Robins firm. I also isolated the potential claims of more than a dozen class members whose \$30,000 claims mistakenly were not published on the online claims database. By agreement with the Robins firm, I contacted as many such class members as I could identify and locate, and assisted them in the claims process. As a result of this effort, most of these class members did file timely claims and receive their claims awards; one (Jack

Sands) received his claims award only after his claim submission was at first erroneously rejected and I intervened with the Robins firm to get it reconsidered. I was not compensated for any of this work, and I refused the Robins firm's offer to reimburse me for out-of-pocket expenses. I subsequently published at my website an article about aspects of this experience, entitled "Arthur Andersen and Me." A true and correct copy of the article is attached as Exhibit C.

9. In 2002, more than a year after the UnCover case was closed, I began inspecting in depth the court records of the settlement phase of the case. My goals were to support my continued writing about authors' rights issues and to contribute to the development of more effective class notice and claims administration models for future similar cases. I found that a number of the key documents of the settlement phase were filed under seal due to what I believed to be an overbroad protective order. With the representation of Roy S. Gordet, an intellectual property attorney, I filed with the United States District Court for the Northern District of California a motion to intervene and unseal. The Honorable D. Lowell Jensen partially granted and partially denied the motion. With the representation of the First Amendment Project, a public-interest law firm, I then appealed to the Ninth Circuit Court of Appeals. In 2003, I reached a settlement with the UnCover case settlement counsel on the release to me of certain disputed documents.

10. From February 29, 2000, through February 28, 2001, I was a paid consultant to the law firm Hosie Frost Large & McArthur ("the Hosie firm"). In August 2000, the Hosie firm filed in United States District Court for the Northern District of California a copyright class action, *Posner et al. v. Gale Group et al.* That case later was refiled in the Southern District of New York and consolidated with other cases to comprise the case now before the

Court.

11. In 1999, I discovered that my copyrighted *Washington Monthly* article was being copied, distributed, and sold on databases owned and operated by Dialog Corporation, which later would become a defendant in this case. At the time, Dialog Corporation was the parent company of the CARL Corporation, the defendant in the UnCover case.

12. From the inception of the NWU's "Operation Magazine Index" campaign in 1994, my *Washington Monthly* article had appeared to be "blocked" from full-text access on databases owned and operated by Information Access Company, the predecessor of Gale Group, a defendant in this case. However, in 2004 I discovered that the full text of my *Washington Monthly* article was available via the Internet on at least two new online article databases. One was operated by HighBeam Research, Inc. (<http://www.highbeam.com>) ("HighBeam"). In the "About Us" section of the website, a link was provided to a December 12, 2003, article in the industry publication *EContent*. The article, viewable via a link to <http://www.econtentmag.com/Articles/ArticlePrint.aspx?ArticleID=5883>), stated in part that HighBeam's predecessor company, Alacritude, LLC, "announced an agreement with Thomson Gale. Under the agreement, Thomson Gale will provide content for Alacritude's eLibrary news archive." Thomson Gale is the parent company of Gale Group. The second Internet article database on which I discovered the availability of the full text of my *Washington Monthly* article was FindArticles (<http://www.findarticles.com>) ("FindArticles"). A true and correct copy of my *Washington Monthly* article, as accessed at FindArticles – and including statements that copyrights were owned in the work by the Washington Monthly Company and Gale Group, both of which are incorrect – is attached as Exhibit D.

12. Searching on the Internet I have found a website for Looksmart Ltd., Inc. which states that FindArticles is operated by that company. (<http://www.aboutus.looksmart.com/>) Thus it appears that a defendant in this litigation, which well knows of my opposition to its violating my copyrights, has contributed to the infringement of one of my articles by providing an entirely new database company, or two, with a copy. Under my understanding of copyright law, I have a new and separate claim of infringement, for which I can recover statutory damages and attorneys' fees, against Looksmart, and against Thomson Gale for contributing to Looksmart's infringement by giving them the ability to infringe the article. Thus, I have to question the fairness of my releasing such a claim for a single compensation based on infringements by others which took place long before these events.

13. In my experience, the confusion illustrated by the widespread copying, distribution, and sale of my *Washington Monthly* article – even among entities directly involved in related litigation, and even by a new database company during the pendency of that litigation – is typical.

14. As the organizer of the “Operation Magazine Index” campaign, I compiled extensive logs of freelance authors' articles on Internet article databases to alert fellow writers to these new practices and recruit them for the campaign. Toward that end, I also would note the per-article charges or otherwise analyze the revenue models of the for-profit companies engaged in this business. Further, in my experience, I have observed that the revenue models for businesses reusing previously published newspaper and magazine articles vary widely, and often are novel. In the classically cited instances, consumer “end users,” typically on home computers, pay per-article download fees. In other instances, the

defendants' databases are provided on a blanket-subscription basis to libraries, corporations, and other institutions. In still others, content is tied to brand-building "loss leaders," advertising links, or other creative arrangements.

15. Subsequent to the United States Supreme Court ruling in the landmark copyright case *Tasini v. New York Times* in 2001, there was a flurry of activity and discussion within the information industry, as defendants in this case, as well as other entities, began notifying their clients of new gaps in the historical record caused by the need to "block" works by freelance authors. In an article in the September 2001 issue of the trade magazine *Information Today*, columnist Barbara Quint wrote: "If the full-text collections of DIALOG and LexisNexis ... keep getting smaller and smaller and the reliability of retrieval spottier and spottier, then why pay high rates? In fact why sign up for subscription contracts at all?... Searchers pay online commercial services top dollar not just for information, but for peace of mind about information." (A true and correct copy of the article is attached as Exhibit E.) In a published letter to *Information Today* in response to this article, I pointed out that flaws in database integrity caused by legal concerns were not new; rather, they were simply newly announced – and unfairly blamed on authors – after *Tasini*. (A true and correct copy of the letter is attached as Exhibit F.)

16. Ever since early 1994, I have been researching on a regular basis the availability of freelance authors' works on online article databases, and in many cases alerting the authors to these probable infringements. In some instances, I also have been involved in helping the affected authors communicate their objections to the corresponding database companies and/or first-print publishers. Often, in such instances, the full-text availability of disputed material is subsequently "blocked" by the corresponding database

companies and/or first-print publishers, with or without explanation. Later, the same articles sometimes are found to be available again, after having been blocked, on new versions of databases operated by the same companies that had blocked the material, or on new databases operated by different companies but with content licensed by the same companies that had blocked the material.

17. On April 26, 2005, I went online to check on the possible current availability of my works at DialogSelect Open Access. I found that my *Washington Monthly* article was identified as available via credit card, for \$4.35. The source of the article was identified as Gale Group Magazine Database. A true and correct copy of the printout of the web page with this information is attached as Exhibit H . This is an example of what I describe in paragraph 16. The defendants, or some of them, have gone right on distributing, to the public and to other databases, the copyrighted works which are subject to this litigation.

18. During the same online search on April 26, 2005, I found that at least three other articles of mine – one originally published in the *San Francisco Examiner* in 1995, the other two originally published in the *San Francisco Chronicle* respectively in 1991 and 1994 – were available at DialogSelect Open Access. I purchased the 1991 *San Francisco Chronicle* article for \$3.70, charged to my credit card. A true and correct copy of the resulting printout of the article, identified as DialogSelect Open Access Session ID 30751060, is attached as Exhibit I.

19. On April 26, 2005, I did an online search of the possible current availability of the works of the works of name plaintiff Letty Pogrebin (“Pogrebin”) at FindArticles. I found that the full texts of some of Pogrebin’s articles, whose copyrights are registered, were available for a fee. For example, Pogrebin’s article first published in the May 15, 1989, issue

of *The Nation*, and registered with the Copyright Office on July 21, 2000, with registration certificate TX-5-245-521, was available at FindArticles, via HighBeam. Thus, it would appear that Pogrebin has the right to statutory damages and attorneys' fees for these infringements by FindArticles, under copyright law. However, I believe that these articles had already been infringed by defendants in this case. I do not know whether her claims would be Category A or B, but they would be at least B since she registered these articles before December 31, 2002. Many questions arise from these facts, which I believe are relevant to fairness of the proposed settlement. Will Findlaw be released under the terms of this settlement, because it fits into one of the broad definitions of the release (such as being a "licensee" of some defendant)? These facts appear to confirm my belief that many class members have experienced multiple infringements by different companies, and for those who have registered their works at any time, they may have some claims which entitle them to attorneys' fees and statutory damages. Thus, is the single award per article or "work" a fair compensation scheme for the class?

20. Attached as Exhibit J is a true and correct copy of an article from the April 4, 2005, issue of *The New York Observer* about the preliminary settlement in this case. The article extensively quotes James Gleick, a name plaintiff, and states in part: "For the most prolific writers, individual payouts could top out above \$100,000."

21. Listing all the works of mine that have ended up in online article databases between 1994 and the present – either continuously or with interruptions, some to the present day, and in addition to the *Washington Monthly* article – is a very difficult task, in part because of the confusion and chaos described above. Indeed, the task is impossible to perform with certainty by a class member, even one with my own background and

experience in this field. On information and belief, an unknown number of my works have been on some of the defendants' databases, and for those available during the statutory period of this lawsuit, they qualify me for Category C of the plaintiff class. I have published several dozens of articles in magazines and newspapers, and conceivably some or almost all of them have been on one database or another at one time or another.

Executed this 26<sup>th</sup> day of April, 2005, in Berkeley, California.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

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Irvin Muchnick

CERTIFICATE OF SERVICE

I, Charles D. Chalmers, do declare:

I am over the age of eighteen and not a party to this action. On April 26, 2005, I served the following listed pleadings by email service addressed as below: DECLARATION OF IRVIN MUCHNICK IN SUPPORT OF MOTION TO VACATE PRELIMINARY APPROVAL AND MOTION TO ESTABLISH NEW PROCEDURES FOR FINAL APPROVAL AND AWARD OF ATTORNEYS' FEES

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